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FURTHER REMARKS

ON THE

MEMORIAL OF THE OFFICERS

OF

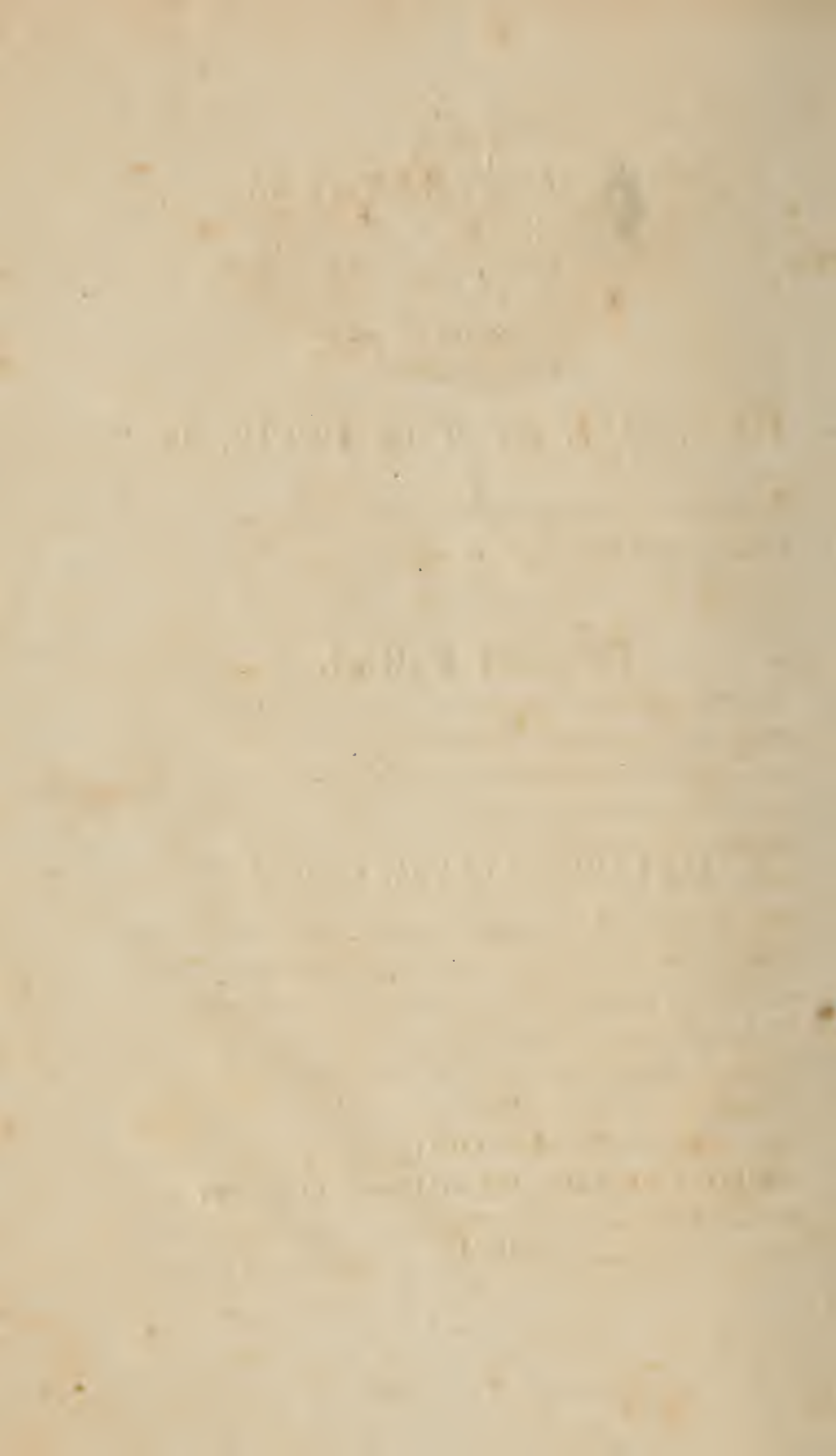
Harvard College.

BY AN ALUMNUS OF THAT COLLEGE.

BOSTON:

PRINTED BY WELLS AND LILLY—COURT-STREET.

1824.



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FURTHER REMARKS,

&c. &c.

A REPLY has been made to my former remarks, and I understand that it is *denied*, that the officers ever claimed an exclusive right to be elected Fellows. If it was an error in me so to have construed the memorial, it is one, which I have shared with some of the most eminent lawyers of the State. It is, however, of no moment, whether we were mistaken or not, since it is *now* avowed, that no such claim is set up. The question is, then, very much narrowed, and the Overseers are relieved from much anxiety, which they might have felt in deciding an important question of *right*. It is now admitted, that every man (being an inhabitant of the Bay) is *eligible*, and it is simply maintained, that the Fellows, so elected, are bound to *reside* at Cambridge. It is not precisely defined, what they are to do, when there, but it is intimated, that they are to co-operate in the instruction and government. The present Fellows then, were *lawfully* chosen, and as neither the charter nor the laws of the College, *since* the charter, have prescribed any ceremony for their induction, they be-

Educ. 17 Feb 60 Benell

came, upon their election by the two boards and acceptance, *lawful Fellows*, and so must continue till removed.

As my remarks have been censured for looseness and obscurity, and as being a popular appeal to the prejudices of the public, I will endeavour, in my brief discussion of this new, and much simpler question, to be more precise.

I shall first consider, whether, if the construction of the charter now contended for be correct, what consequences would follow from it ; and what, under all the circumstances of the case, should be the course of the Overseers ?

2d. I shall endeavour to show, that there is still less colour for the position now assumed, *that the Fellows are held to reside*, than there was for the claim of the memorialists, of the exclusive *right* of being elected.

In the first place, if it be true, which it is very far from being, that it was the intention of the charter that the Fellows should reside, what consequences follow from their *failing* so to do ? It would, it may be said, be such a neglect as would justify a *removal*. If it was the duty of the Overseers to remove them, the fault lies upon them, and they have at least the satisfaction of knowing, not only, that by this neglect they have deprived no citizen of his *vested rights*, but that their negligence has been shared with more than a thousand persons, who have held the same offices from 1672 to 1824—and that these persons enjoyed

the reputation of having a fair proportion of the talents, learning and wisdom of the republic.—Nor is this all. The Overseers may justly feel a delicacy, especially in such a case, in charging *all* their predecessors with ignorance and wanton negligence. They may think, that the charter *being silent* on this head—the facts very imperfectly settled, they should be justified in deciding that the construction put upon the charter at so *early* a day, and acted upon by five or six generations of learned and able men, is entitled to high respect; and even if in their private opinions there seemed to be some colour for the position here assumed, after a century and a half; yet they are bound to respect such a constantly repeated, and so ancient a construction. Let us see by *whom* this construction has been put upon the charter?

1st. By the *resident Fellows* themselves—the *persons interested, as it is said, to resist it*. In 1672, three non-residents were chosen at once. By the charter, four members of the corporation are necessary to an election. It is demonstrable therefore, that all the resident Fellows and Tutors FIRST put this construction upon the charter, and that too, in twenty-two years only after its date, when all the *facts* were *perfectly known* to them.

2dly. By the Board of Overseers, who are obliged to act *positively* in every election. In 1672 Samuel Danforth was a member of the Overseers, and had been named *one of the first Fellows*. He, and the *major part* of the Overseers then knew, perfectly

recollected, what was the understanding of the framers of the charter, and what were the facts (now so obscure) which had occurred after the grant of the charter. It is also to be observed, that the Governor, and one branch of the *Legislature*, have (with the exception of two years) *always* been members of this Board, and thus, it may fairly be asserted, that the construction which has been put upon the charter for 152 years, was approved by the *public authorities*.

3d. The framers of the Constitution of 1780, put the same construction upon it. They recite *all* the charters—they had them *of course* before them. They knew, that Bowdoin, and Cooper, and Lathrop, and Howard, were all *non-residents*, and with submission to the learned and eloquent reviewer, they confirmed *them personally* in their offices, though they did not name them. Where were the resident officers at that time? On the spot, at Cambridge, where the Convention was held. Why did they not interpose their claims, or suggest this *departure* from the charter? Forty-four years have since elapsed without a murmur.

4th. The Legislature under the new Constitution, have, by a long succession of acts, indirectly confirmed the non-resident corporation. The last great measure was the grant to the *non-resident* corporation, upon *their memorial*, of 100,000 dollars, to build a Medical College in Boston, to provide for the support of indigent scholars, and to promote the other

great objects of the College. This surely is not, though recent, one of the heavy marks of displeasure, which the government has inflicted on the corporation.

We think therefore, that if there were doubts *about the question of residence*, the present Overseers may fairly and honourably, nay, we think, *are bound*, fairly and honourably to consider the question *settled*. Miserable would be the state of any country, in which questions so long at rest, should be held to be the subject of renewed controversy.

“Interest reipublicæ, ut sit finis litium,” never could have had a more suitable application. We doubt whether the whole history of legal proceedings in any country of stable and fixed jurisprudence, can produce a case like the present.

But we entirely deny, that the charter, and the practice under it, give a colour to the position that the *residence* of the Fellows is indispensable.

1st. The charter is as entirely *silent* about *residence*, as it is about the confinement of the choice to resident officers, which is now given up. One line, nay, one word, would have settled the question forever. Yet that one word is *omitted*.

2d. There was, when the charter was made, a by-law, requiring the *resident* Fellows to subscribe certain articles, among others, requiring them to *teach*, &c. all of them *implying residence*. This ordinance is unrepealed. It was recent when the charter was granted. There is not a pretence, that any *corporate* Fellow was ever called upon, since the charter, to

sign *this* engagement. The election and acceptance are all that has been required. Can there be a stronger proof, that the *corporate* Fellows were considered, *ab initio*, exempt from this law?

3d. But I am called upon to answer, why I took no notice of the argument about the "Tutor's pasture," and I am asked, if I thought it too *contemptible* for reply? I certainly have too much respect for the memorialists to say, that I considered it so, but I must say, when thus challenged, that I thought it a most unfortunate argument—and still more so, since the new explanation of it. In the *memorial*, it was alleged, and truly, that a small lot of land had been enjoyed by the Tutors for more than one hundred years—in the *new reply*, it is said further, that the grant to the resident Fellows was in 1645, *five* years before the charter. In the *memorial*, it is alleged, that the rent of this pasture was within a few years taken away from the Tutors, and the *last landmark* thus removed. In the *new reply*, it is said, that the *possession has continued to this day*. Now it is not in my power to invent a case more unfavourable for the memorialists. If, as was asserted in the *memorial*, there was *at the time of granting the charter, a body of men popularly called the President and Fellows*, and if the charter was simply an incorporation of *those men*, then all the property granted to them, or either of them, "*eo nomine*," became at once, *ipso facto*, the property of the corporation.

It would have been an act of dishonesty in the Fellows to retain to their own *private* use, any part of the public property, and of culpable neglect in the corporation, to *suffer* them to do it. Yet it is alleged, and *truly so*, that the two Tutors did retain the grant of a piece of land to themselves, and they and their successors, excluding the professors, have occupied and possessed it, and received its rents and profits nearly, or, (as it is asserted) *quite* down to this day. I know of no stronger proof than this, that from the date of the charter, the *resident* Fellows and the Corporation were considered *distinct* bodies, having separate interests. Besides, if this insulated fact *is cited as a proof*, that the *resident Fellows once held* all the *corporate* estates, how can they account for the fact, that they have lost all the thirteen acres of College ground except this *half* acre? When, by whom, and in what manner, was this disruption of the College property effected? There is *no pretence* for it. The *College* Fellows, always distinguished from the *corporate* Fellows, retained land granted to *them before the charter* as their *peculium*, and denied that it belonged to the new (and in some respects foreign) body, created by the charter. It will be now perceived, that this argument was not omitted from any apprehension of its force.

4th. But a very novel argument is suggested. "The College at Cambridge is declared to be a corporation"—therefore the corporation is the *College*.

The College must be *at* Cambridge, and therefore the *Corporation*, which is the *College*, must be there too. Wherever the corporation resides, *there* is the College, and of course it follows, that one seventh part only of the College is *at* Cambridge, one seventh in Roxbury, and four sevenths in Boston, the other seventh, as there is a vacancy, being at present *no where*. Yet this idea was so new even to its author, that in the page before only, he speaks of the *College* having been removed to *Concord*. Now the corporation *never removed there*, of course the *College*, on his principles, did not. To be sure, what we commonly call the College, viz. the immediate Government, Graduates, and Students, were removed, but the *College never was*, upon this novel construction. Yet he says it was. There would be one singular inference from this doctrine, that if the corporation should *all reside at* Cambridge, they might send all the rest of the institution to Worcester, and when called to account for this breach of the charter, they might reply, "The corporation (that is the College) are still at Cambridge." The words of the charter are therefore fulfilled.

But it may be said, the language in the reply "of the College removing to Concord," was used *popularly*. Yet that will not do, because it is said, that *nothing but necessity* could *justify* it, because the *charter provides*, that the *College* shall be *at* Cambridge. There would have been some colour for the argument, if it had been contended, that the Corporation, immediate

Government, and Students altogether, made the College. Yet even this could not stand the test of sound examination, because the learned writer maintains that the Overseers are a more legitimate branch of the whole College government, than the corporation as at present constituted, and surely it will not be contended, that the Governor and Counsellors, and Senators, and Pastors of churches, are bound to reside at Cambridge—and yet they are as much a part of the *College*, in a legal sense, as the corporation.

5th. But great use is made of the words “maintenance of the President and Fellows” in the preamble to the charter, and in some other subsequent, but very early grants; and it is inferred, that if they were to be *maintained*, they were *impliedly to reside*. Now the fact is, that from the *very date* of the charter, *all* the Fellows were *never* maintained. The words are entirely fulfilled by the maintenance of *any of* the President and Fellows. There are early distinctions made in the College records, between Fellows *who received stipends* and those *who did not*. *After the charter*, President Dunster was so poor, as to write to the Government, and complain, that he should starve, unless he could be relieved. Is it possible to admit, without any colour of proof, that in that condition they supported *five* Fellows? The words import no more, than that there were *some* Fellows and a President to be maintained. This has been *always the case*, and is so *at this day*. All

the words of these grants are therefore fairly and substantially fulfilled. The President is now wholly maintained, and the Treasurer partially—that is, he has a salary from the College funds. No words either in the charter, or in any of the acts, imply, either that *all* the corporation are to be maintained by the College, or that they *are always* to be maintained, and surely it is not a cause of censure, that *many* of the Fellows now demand nothing from the College funds. The truth is, that those grants for the support of Fellows, merely referred to the *existing state of things*, and provided support for *destitute or teaching Fellows*. They have no bearing whatever on the general question, nor any relation to the *present* state of the College, when the funds are sufficient to support the Teachers, *who were formerly Fellows*, (it is *admitted*,) but not always *members of the corporation*.

As there were, when these grants were made, *distinct* bodies, to wit: President and *resident Fellows*, who *instructed*, and a President and Fellows appointed by the charter to *govern and manage the property and concerns*, language of this sort ought to be applied “reddendo singula singulis.” When *maintenance* was spoken of, reference was sometimes had to the *actual* teachers, yet monies given by deed, or devise, a grant to the *maintenance* of the President and Fellows *after* the incorporation, must generally be intended to be to the maintenance of them in their *corporate capacity*, to enable them to uphold the edifices. provide

the instruction, and meet all the other exigencies of the institution, unless the words necessarily purport otherwise.

Lastly. There is in the reply to my remarks, a great display of extracts from ancient records, which will be very likely to make an impression on those who do not give themselves the trouble of thinking, but unless my perceptions are as obscure and loose as they are represented, these extracts go farther to settle the question, to confirm the construction which six generations of wise and learned men have put upon the charter, than any thing which could have been urged. The public are therefore much indebted to the indefatigable industry of the author of the reply for his collection of facts.

The first document which I shall cite from the researches of the author of the reply, is numbered by him III. and is to be found in page 63 of his very elaborate treatise. The General Court, in August 1653, appointed a committee to make a very full investigation as to the affairs of the College.

The fifth article of their commission was in the words following :

“ 5. To consider what *number* of Fellows may be necessary for carrying on the work of the College, and what yearly allowance they shall have, and how to be paid.”

The parts italicised are those, which the learned author of the reply to my remarks, has *thus* marked, and the object would seem to be, to prove, that the corporate Fellows were to *work*, and *be maintained*.

This clause seems to my mind to settle the *whole* question the *other* way, and to prove, that the construction uniformly put upon the charter is correct; to wit, that the *corporate Fellows*, and the *working Fellows*, were as early as 1653, three years after the charter, distinct bodies. The corporation was then in high favour. Four years afterwards the General Court enlarged its powers most materially, by the appendix to the charter. Now it is incredible, that they intended to refer to a committee the question, what *number* of *corporate Fellows* there should be, because the charter had *fixed them at five*.

The question submitted to the committee was, what *number* of "Fellows was *necessary to carry on the work* of the College," that is, what number of Tutors and resident Fellows was necessary for the number of students taught. This precisely corresponds with the view which I have presented in my remarks, of the *early* state of the College—with its early history—with the probable and natural course of things. It would be to suppose our ancestors spendthrifts, and madmen, to contend, that they supported *five* Fellows to teach twenty-nine, and sometimes, sixteen students.

This case therefore, establishes in my mind, as the *truth*, and which *alone* can reconcile the apparently contradictory *facts*, "that the *corporate* Fellows, as such, were *ab initio* a *distinct* body," of which the *teaching* Fellows *might* or *might not* form a part. We have no positive proof, that, from the very commence-

ment, they *did* form a part of the corporation, though it is highly probable, that some of them *did* so. In later times, we know, they were generally admitted to form a *certain* proportion of the corporation, but *never* on the ground of *right*. It is clear, that the General Court, in this fifth article of the commission referred to *teaching* fellows, and did not intend to authorize that committee to inquire, whether the *corporate* Fellows, whose number was fixed, should be reduced. They were confined, to the question, how many *resident* instructors were necessary. The resident Fellows, who were instructors, were *maintained*, and there were but *three* till 1720, seventy years after the charter. If this case proves, as it appears to my mind to do, that from the *date of the charter* the *fellows of the corporation*, and the *working Fellows*, were always kept distinct, in the apprehension of the General Court, and of the public, it furnishes, *at once*, a simple explanation of the language of all the legislative grants and private donations, which would seem in some cases to be absurd, without it.

When therefore the Legislature granted a sum to the support of the *President and Fellows* "to be *proportioned as the Overseers shall determine*," according to *our* view, they intended *such* Fellows *only* as *carried on the work of the College*, or were *Teachers*, and whose *number* they were desirous should be as *small* as was *necessary*.

The various private donations for the support of

Fellows, cited by the learned author, seem to me to be in *exact accordance* with this simple, natural, and to my mind, inevitable construction.

1st. John Glover gave a donation for and towards the maintenance of a *Fellow there, five pounds forever*. Will any person believe, that this was a grant to the President and Fellows as a corporate body? Was it not (being *made after the charter*) as distinct a grant for the maintenance of a *College Fellow*, as any words could make it? It would have no bearing on the present question to inquire, *why* the corporation have not elected *Fellows*, to whom this grant would go. Very satisfactory reasons may be assigned for it if it was necessary—but it is clear, that such a grant had no reference to the *corporate Fellows*.

2d. Robert Keyne also in 1653, left 320 pounds, “for some addition yearly to the *poorer sort* of *Fellows*.” I hope this could not be construed to be the *corporation*. It evidently meant fellows, neither *instructors* nor *members of the corporation*, but simply resident candidates for the ministry, and other professions, who resided there, and were in indigent circumstances; some of whom were in early times elected *Fellows*—certainly not *corporate Fellows*.

3d. The Pennoyer fund was given, with a provision, that two *Fellows*, and two scholars *forever*, should be *educated, brought up, and maintained* in the College at Cambridge. What! and is this too *cited against us*? Did *this* intend, that the existing *Fellows and Governors of the College* should be *educated* and

brought up there ? It only shews, how easy it is to arrange a large mass of authorities, which have no sort of application to the great question. Touching this Pennoyer fund, for example, it was suffered to accumulate, till the corporation lately thought it so respectable, as to allow one hundred dollars a year to a meritorious scholar not in affluent circumstances, and one hundred dollars a year to a Pennoyer Fellow; the only one in the College *at present*, but surely it would be going very far, to say that the Pennoyer fund was granted for the *maintenance of the President and Fellows only*.

I perceive nothing further in relation to the present question, that it is necessary to meet. There are many parts of the elaborate reply *which require no answer*. There are others, which could not be answered without giving mutual pain. I could point out many mistakes as to the representation of my own statements. But I am willing to submit to all the ill effects of them, and am entirely ready to rest the argument as it now stands.

I think it may be gratifying to those, who saw the statement of the abortive attempt of 1722, to see in what light so excellent a President as Leverett, and so respectable a man as Gov. Shute, viewed that question.

LETTER FROM PRESIDENT LEVERETT TO DR. COLMAN.

Cambridge, Nov. 26, 1722.

REV. AND DEAR SIR,

This morning I am informed, that the House of Representatives have brought forward their bill for *alterations* in the corporation, which the Governor signed with the proviso of your, Mr. Wadsworth's, and Mr. Appleton's continuance as members of the corporation, and suppose the intent is, to refuse the Governor's allowance, if he don't come into their scheme without reserve. I understand also that Col. Dudley has informed the House that Mr. Wadsworth and you will resign your places, and then the way will be clear. But *I hope better* things of you. However, I doubt not, salvation will come to this poor society, from Him, to whom salvation belongs.

His Excellency has told me, that he is *so well satisfied*, that the project will be *fatal* to the College, that he *never* will come into it, *let what will come*. I pray God confirm his resolutions, and prevent this *ruin* coming to the College under his hands. I ask your prayers for the Divine presence with, and direction to me in the affair, that will be but so much the more difficult for me, if you withdraw.

I am, &c.

JOHN LEVERETT.

Nothing need be said of Leverett's presidency—his efficiency and usefulness. He had been fifteen years president when he wrote this letter. He had

been surrounded by *resident* and *non-resident* Fellows, and he considered the retirement of the non-resident Fellows fraught with ruin to the College. In my remarks, I said, that if the claim set up by the memorialists should be admitted, there would be danger of collisions. The *tutors* might justly pretend to a prior right of election. This would produce divisions and discord. The following extract will shew, that these fears were not without foundation.

EXTRACT OF A LETTER FROM WADSWORTH TO COLMAN.

Jan. 14, 1728-9.

“As for Professors with us, I’m heartily desirous, that all proper regards should be paid to them, but being of late date with us, I think they have no claim to work or wages, but what their founders’, rules, and consequent acts of the corporation and overseers give them. If they do the work thus assigned them, and receive the benefits annexed to them, I think they have no reason to be uneasy, or to make others so.”

Signed by PRESIDENT WADSWORTH.

Some curiosity was excited by the fact, that three young men *just out of College*, (and certainly not tutors, because Mather and Danforth were the tutors, and for seventy years afterwards there were but *three officers of all descriptions*,) were nominated Fellows in the charter. And there was no reasonable explanation why they were described as “all *inhabi-*

tants of the *Bay*," a most fatal clause for these modern pretensions. I was not satisfied with the explanation, that they were called inhabitants of the Bay, to signify "that they were not looked for from Europe." It seemed to me, to be too far fetched. An intelligent friend has given a rational solution of these facts. Mitchell had been preaching at Hartford, on probation, in the autumn of 1749, before the charter. Ill health obliged him to return to Cambridge. It was expected, that he would be settled there, as he soon afterwards was. He was therefore a convenient Fellow in the infancy of the College, when Dunster was praying for thirty pounds to finish, and secure from rain the only college edifice. There could be no thought of calling the *eminent men* of Boston to superintend affairs of such small amount, especially since as overseers, they had *great* authority. As to the two other Fellows, who were not officers, it seems that the colonies of Plymouth and New Haven had been called upon, and had contributed to the support of the only New-England College, and therefore when the charter was granted the General Court, to conciliate these colonies, *probably* inserted, as Fellows, Comfort Star, a very young man of the Plymouth Colony, whose father was of some consequence *there*, and Samuel Eaton, son of a distinguished citizen of New Haven Colony. It would be difficult to devise how on any other principle, it should so happen that the choice should fall upon them. Still, the General Court of Massachusetts, fearful

that it might be drawn into a precedent, made the limitation of "Inhabitants of the Bay," which at that time, as resident graduates, they actually were. These circumstances are only alluded to, as furnishing a more rational solution of the unexplained facts in the early, and too obscure history of the College.

Some excitement seems to have been felt at my remarks upon the effects of vesting so much power in any one public body—viz. Self election—and the fixing their own duties and emoluments. These remarks were simply the expression of principles, recognized in this country of laws, as to *all* men, and all *bodies* of men, from the President to the lowest corporations in the Republic. If they are unsound, we have all been in an error; but I will simply remark, that the most delicate, embarrassing and painful questions, which the Corporation have ever been called upon to discuss, during the last thirteen years, have arisen from the claims of salaries, grants, indulgencies and occasional exemptions. They must be so in their very nature, and every man will feel them to be so. I do not mean to intimate that there has been any thing more demanded, than other officers of all descriptions in civil society ask and expect. Still they are always difficult and embarrassing. We are told, (it was new to me,) that the corporation contemplate reducing the salaries of the present officers; but it would seem not to furnish any peculiarly strong reasons for the demanded change. I owe it, however, to truth and principle, to say, that I entirely agree in the

opinion expressed by the author of the reply, that every possible encouragement should be given to induce men of the finest talents to accept and hold these offices—that I had no idea of throwing out any expressions which could give pain when I spoke of their pleasant and honourable duties. I meant simply to intimate what I have always thought, that there were no professional men in the State, whose situation is in many respects more eligible. There are undoubtedly occasionally, very painful scenes, which the officers are called to encounter, but if compared with the laborious and often unsuccessful struggles of many professional men, I should still call their general condition enviable.

I think it may fairly be inferred, that this is the general opinion, from the readiness with which gentlemen quit the other professions to accept these offices, and from the abundant leisure which they appear to afford for other pursuits.

NOTES.

NOTE (A.)

THE CASE OF SAMUEL DANFORTH, ONE OF THE FIRST CORPORATE FELLOWS.

IT is perfectly natural, that the advocate should make every effort to explain away the facts in this case, because although of very little comparative importance to the *defenders* of the charter, and of the long continued usage under it, it would be fatal to the pretensions of the memorialists, if Danforth was a *non-resident*, when he was named in the charter, and *continued to be a Fellow till his death in 1674*. My conviction, that this was true, is in no degree affected by the reply. I cannot admit, that Mr. Danforth, having been a tutor and resident Fellow *before* the charter, throws the burden of proof on the present corporation.—I deny, that there is the slightest evidence, that Danforth was a resident Fellow on the 31st of May, 1650, when it is proved, that he had been dismissed from the church, at Cambridge, and admitted a member of the Roxbury church, nineteen days before. He was not competent to administer the ordinances at Roxbury before ordination, which did not take place till September following. There could be no motive for his requesting a dismissal from Cambridge and joining the Roxbury church, excepting a change of *domicil*. If he was preaching as a *candidate* merely, it would have been, to say the least, very indelicate to presume, that he should be elected Pastor, and to take so presumptuous a step, as to change his church relations, which he might be compelled, if not chosen, to rescind. It seems to me, therefore, that Mr. Danforth had received and accepted a

call, had changed his domicil, and was in truth a resident inhabitant of Roxbury at the time he was appointed a corporate fellow by the charter. We do not think that this presumption is even *weakened* by the two quotations of the indefatigable author of the reply. Dr. Hoar's expression in his letter to his nephew, intimating, that Mr. Danforth was "*formerly of the Society*" of the college at Cambridge, seems to me to have no weight. No person would *now call* Mr. Prescott or Dr. Porter "*of the Society at Cambridge,*" and it is, indeed, the very point of our argument, that the Corporation *never were considered* or called, or *in fact were* "*members of that society*" since they left the College. The great fault, which we find not only with the memorial, but with the elaborate defence of it, is, that in them both, there is throughout a *petitio principii*—an assumption of facts and principles, which are denied, and which are not supported even by *colourable evidence*.

Nor am I more convinced by the expression of Johnson in his "*Wonder Working Providence,*" in which he says that Danforth "*is now called to the office of a teaching elder in the Church of Christ at Roxbury, who was one of the Fellows of the College.*" Johnson's book was published a year or two only after the charter. All parties are agreed that as *well before* as for years *after* the charter, the Tutors were called Fellows—and that term was never given in common parlance to the *Corporate Fellows*, except in the academic records, and in law proceedings. It is not, therefore, to be inferred, that Johnson meant to say, that Danforth was not "*a member of the New Corporation.*" Even at this day, no man would use the term "*Fellow*" as applied to the *members of the Corporation*, if there were *resident Fellows*, or if the Tutors *had that title*. But these insulated facts cannot explain, or controul the strong language cited by me, in my first remarks. In the charter of 1672 Mr. Danforth is thus described: "*Samuel Danforth, Fellow of the said College,*" and Uriah Oakes in the same charter is described as "*Pastor of the Church of Cambridge.*"—Now we can see no good reason, why Mr. Danforth, if not a Fellow, if he had *only been* a Fellow for *four*

months 22 years before, should not have been styled "Pastor of the Church in Roxbury," which he *then* was. But it may be said, that the title of Fellow was the more honourable one, and was therefore bestowed upon him. Yet I ask, whether it would not have been more natural to style him "late Fellow," or "formerly Fellow," or in the quaint language of the times, "some time Fellow."

I now advert to the alleged entry in the College Records in 1674:—"This day died Samuel Danforth, *Senior* Fellow of the College." It is said, that this title might have been bestowed because he was 22 years before, for four months, a Fellow—but in truth he was never *senior* Fellow of the College, unless from his being such at his death, for Samuel Mather was the senior Fellow named in the charter. It is pretended that this title was given him, because he was the *first* named Fellow in the charter of 1672—but it is indisputable, that that charter was never accepted. The *title* is given to him in that charter, as his *subsisting legal addition*.

Again, if Danforth was not a member of the Corporation in 1672, it is impossible to account for his not being *elected* in that year, when *three non-residents* were introduced. He had more experience, and as great reputation, and was named as the first Fellow in the abortive charter of 1672. If he was not at *that* time a member of the Corporation, it is unaccountable that he should have been omitted in that election. I, therefore, consider it as *well* established, that Danforth was a Fellow, when the Corporation proceeded to elect, in 1672, three non-resident members at once. But I conclude by asking why we should pervert the natural and necessary meaning of phrases in such a case as this? Why should we, in order to support such a phantom, which has never been raised since 1722—adopt such an unnatural interpretation, and construe terms, which imply the *present* time, to have a reference to *periods long past*? The language in the charter of 1672 necessarily imports, that Danforth was *then* a Fellow—the expressions in the College Records *present* the *same* idea. Was it ever known, that the Col-

lege Records took notice of the decease of a Fellow, who was *not in office*? But it is usual and necessary to enter the death of *Fellows* dying in office. This record is proper, to show a recent *vacancy*, and is sent to the Overseers to enable them to recommend a *new* election. On the whole, I feel convinced, that those who seek the *truth*—those, who by their offices, are compelled to investigate with some labour, will be convinced, that Danforth was *not* resident when he was named in the charter, and that he continued a member of the Corporation till his death. That, before his death, three non resident Fellows were elected, and a greater or less number of non-residents have, from that period constantly been members of the Corporation, are facts, which certainly strengthen this very strong presumption. It will be readily perceived that these remarks are addressed only to those, who are bound by their duty, or induced by a love of truth, and of regard to the College, to examine *carefully* the grounds of argument on both sides.

NOTE (B.)

THE memorialists placed their claim on certain assumptions, which cannot be supported. They alleged that the charter, in fact, incorporated *only resident Officers and Instructors*—and the late very elaborate and specious reply does not materially depart from this ground. Though it disclaims the pretence of right, yet it seems to cling to the *same* doctrine, that all the *early Fellows* under the charter were *teachers*, and *were maintained*. There never was a proposition less supported than this, by their own documents. But I shall adduce one proof, which to my mind, seems to set this new pretension as completely at rest, as the claim of *exclusive eligibility*, which is disavowed.

There exists on the Corporation Records, an order or ordinance, bearing the date of 1666, six years before the *alleged*

first choice of non-resident Fellows, which provides, that the Fellows who receive *stipends*, and *do the work* of the College, shall reside *within the College walls*.

This case proves, that nine years after the charter of 1650 went into operation, (which was not the case till 1657,) there were *certain* Fellows, who were *maintained* and who did the *work of the College*, and *others who did not*, and who were not *maintained*. The defender of the memorial is at liberty to construe this ordinance as will best suit his purpose. Either the word "Fellows" here intends "College Fellows," Tutors, and resident Fellows, *not Tutors*—or it intends the *Corporation*. In either case it proves that there were Fellows who received *no stipends*, and who did *no work*—and others who were *maintained*, and who governed and taught. My own opinion is, that it referred solely to *resident Fellows*, some of whom were paid, and others merely suffered to remain there, to complete their education, and that the *corporate Fellows* who enacted this ordinance, were a *distinct* body; but if it be referred to the fellows of the Corporation, it proves that some of them, from the beginning, were neither *maintained*, nor employed in the work of the College.

I have no doubt, that if access could have been had to the College Records, I could have placed this question in a still stronger light, but I have purposely abstained from requesting this favour, lest I should draw down upon the present highly respected members of that body, a still greater share of not *very indirect* censure.—I now declare, that no member of the Corporation had any knowledge of my intention to publish the remarks on the memorial of the Officers, till they appeared in print—that they were written and published solely from a personal conviction of the unsoundness of the doctrines advanced in the memorial, and of their tendency to injure the interests of an Institution, which has been the constant object of my solicitude through life; connected, as I have ever deemed it, with the best interests of our republic. I have been surprised, that such an entire conviction of the illegality of the past elections, had not

induced the few who felt it, to resign appointments, which they must have perceived to be void—thus giving to the *new Corporation*, which they prayed might be appointed, the opportunity of electing new officers.—It is nearly demonstrable, that if other men had been elected 152 years since, and an organization *entirely different* had existed, no one of the present officers would probably have been called to perform the duties which now devolve on them. It can scarcely be believed, that any other set of men would have had *precisely the same preferences*, unless it should be contended, that our community cannot furnish other gentlemen as well qualified.

I have neither the leisure nor the *learning* requisite to discuss the intricate questions of ancient and modern law, with which the author of the reply has incumbered the question at issue. Having withdrawn myself, (for nearly one quarter of a century,) from the study of the science of law, to which, in my youth, I never devoted *more* than seventeen years of intense application, I should deem it very presumptuous to enter into the examination of such nice and difficult questions, without much previous preparation. I am, however, consoled by the reflection, that this exhibition of legal erudition has very little bearing on the present question, (narrowed as it now is by the concession of the advocate of the memorialists,) and if it *had*, there are many eminent Jurists, in both the College Boards, who would do honour to any country, and who are abundantly able to supply my deficiencies. They are men who have acquired their knowledge by patient and laborious research, and not by inspiration.

NOTE (C.)

It would seem, that the committee of the overseers, and that body itself, are placed in rather an embarrassing situation by

the new and unexpected explanation of the purport of the memorial. The author of the reply assures us, "that *he alone* is responsible for his observations, and that whenever he speaks of and seemingly for his colleagues, he speaks *only from presumption*." We are pleased to hear it. Do his colleagues assent to this *disavowal* of the claim of right? Did they understand the memorial differently from what it has been universally understood by the public? Although we readily admit, that the author of it, in the heat of argument, might have overlooked the strong expressions claiming for the officers the exclusive right of being elected, (and we are bound so to admit it on his declaration) yet can we extend the same belief to the officers who joined in it, in whom were united so much legal, critical, and logical skill? We are bound to believe, that *they* construed the memorial, as eminent lawyers have understood it, and they may therefore still adhere to the *claim of right*. It would be impossible for us to admit, that they who considered it coolly, could have overlooked the strong expressions, and the general tenor of the memorial, and still less that they would subscribe a paper, that purported to advance a claim, which, in truth, it was not intended to maintain. It is not from several repeated, and clear phrases *only*, but from the general scope of the memorial, that the public were led into the error of supposing, that the officers claimed to be *alone* eligible. The analogy suggested between the Fellows in the British Colleges, and those which our charter intended to incorporate, and which was the basis of the memorial, *implies* this claim; because the Fellows are in those Colleges always a part of the Corporation. The several expressions of the memorial quoted in the fifth page of my Remarks also confirm this construction. The argument founded on the possession of the Tutor's pasture proceeds upon the same ground. What is meant in the memorial by saying, "that this third non-resident body has undermined the *two* others, and while it has *taken* from the *immediate government* its responsible

powers, and its most *valuable privileges*, has almost rendered nugatory the functions of the overseers?" Did not this sentence claim the *corporate powers* for the immediate government, and consider them as their most *valuable privileges*? Is the language of the memorial admitted to be so loose, that no sense whatever is to be ascribed to these words? What are we to understand by the declaration, "that *this privilege* [that is, of constituting the Corporation] was in 1806, after 170 years possession, entirely *wrested* from *them* by the non-resident Corporation?" Let alone the facts, which were by their own *confession* directly opposed to this bold and unqualified statement; how could a *privilege* be *wrested* from a body of men, which, it is admitted, they never claimed or enjoyed? If I comprehend the *present* ground, (and I feel great diffidence in making any *conjectures*, as to what is the ground assumed,) the Corporation and overseers are *competent* to fill the existing vacancy by electing *any* man in the State. That they may do this *lawfully*, but the Fellow so elected must go to Cambridge, and reside in or near the College. What then is this *privilege* which was *wrested* from the immediate government? It has been on their own principles equally *wrested* from every other citizen, who has *not been elected*. But all these quotations, conclusive as they are, cannot be compared with the concluding sentences of the memorial to the Corporation, the very place, in which the gist, and scope of a petition is expected to be found, and where it ought to be defined; and *there*, it is put most expressly on the *ground of right*.

I repeat, therefore, that the overseers must be deeply embarrassed, in considering the question, without a declaration of the immediate government as to *which* position they mean to assume, and I think they are bound to express their sentiments *distinctly* on this point.

It could not, of course, be expected, that I should so far forget what is due to decorum, as to reply to the numerous sneers upon my remarks; such, for one example, as imputing to me the declaration, that the masters and fellows of the colleges

in Great Britain were the visiters of colleges. I said no such thing ; and the most cursory reader will perceive, that I alluded to the *charity schools*, whose abuses have been proved to be so enormous, and of some of which the *masters and fellows* of the English Colleges *are the visiters*. I knew, at least as well as the author of the Reply, that the friends of the two universities had successfully *resisted* the proposed inquiry into *their abuses*.

I would say a few words, in reply to the invidious remarks upon the Corporation.

It is alleged, page 20th, that "*every one of the Fellows of the Corporation is now actually a member of the board of overseers, where they may approve, and have by their casting votes approved, their own votes as members of the corporation.*" This assertion, from a Professor of the College, will, of course, receive full credence on the part of those ignorant of the facts ; but Judge Davis, one of the Fellows, never was a member of the board of overseers. Mr. Prescott resigned his seat at that board as soon as he was elected, and Mr. Otis has not appeared, I believe, at the board of overseers since his election and of course never has by his *casting vote approved his own vote* as member of the Corporation. There remain two others, Dr. Porter and Dr. Channing, who, by the constitution of the state, are, *ex officio*, members, and it is their *duty* to remain there. A very determined enemy of the College some years since made it a charge against these two gentlemen, that they voted in the board of overseers in support of their own acts. This charge proceeded upon a vulgar error. It confounded the distinction between *judicial* appeals and the acts of concurrent legislators. In the former, the aggrieved party appeals to another tribunal on the ground, that the inferior one has done *him injustice*. It would be indelicate and unjust in the officer, whose decision is impeached, to sit in the appellate tribunal and to sustain his own questioned opinions. But we can see no reason, why a member of the corporation of the College, who has voted for a Professor, because he esteemed him to be

the *fittest* man, should not give the *same* opinion in the *other* board; since there might be no *pretence*, that the decision below was *complained* of. This objection has always seemed to my mind to be addressed to the prejudices, rather than the good sense of the public, and it was a subject of grief to see it repeated from a source so high.

Nor can I feel better satisfied with the declaration, that the intimation that the officers were only "*servants* of the Corporation," was only a *jest*—certainly a jest very ill placed—and the renewed suggestion, "that the Corporation *still use* this expression, *when speaking* of the *venerable and learned members* of the *immediate government*," seems to prove, that it was considered as not a *sportive* expression. We know that the belief that such language has *ever* been used in the Corporation, is without the *slightest foundation*: at the same time, we cannot but feel pain, at the existence of a jealousy so unfounded. Nor are we better satisfied with the reproaches cast upon the *former* members of the Corporation, men, who have been venerated for more than a century. We think the effect of these reflections, upon the character of those, who have till now been esteemed worthy of the highest respect, is pernicious to the cause of truth. It must seem strange to men accustomed to forensic reasoning to see the author of the reply, after *explicitly* renouncing *all claims of right*, still recur to his *disavowed* opinions, and speak as he does in his *defence* of the memorial, of the past elections of the Corporation, (page 48,) as follows: "It is to take from the residents a *very valuable property*; a *very important vested right*." And again—"I *do* apprehend that merely on loose notions of expediency, addressed in *popular* appeals to the community, the *very importance and value* of a *right* will not be made the grounds of *taking it away*." So soon had the author forgotten his disavowal of the *claim of right*.

I am unable to perceive how that can be a *very valuable property*, and a *very important vested right* in the *immediate government*, which *every citizen* of the State had a right to *share* with them.

NOTE (D.)

UPON perusing the text, I find I have omitted some remarks, which seem to me to be important. Those who shall examine with care, the very imposing list of *Documents* comprized in pages from 61 to 70, of the defence of the Memorial, will perceive, that *every one* of them, (except the truly unlucky quotation from Randolph, page 70, which I shall presently consider,) bears date from 1652 to 1654, or at least all before 1657. It is a well established fact, that from 1650, the date of the charter, till 1657, there were no *corporate* fellows in action. The corporate fellows did not accept the charter, till the Legislature amended it by the Appendix, as it is called, in 1657. This is proved by the fact, that when President Dunster resigned in 1654, he resigned to the *General Court*, and not to the Corporation, who had the power of election, and to whom all future resignations have been made. *He held* at that time, all the *Corporate funds*, and the General Court authorized a committee to receive them of him. Of course there was then *no treasurer*. The records of the Corporation furnish no proof of their acting under the Charter till 1657. All the documents—every one of them cited by the defender of the Memorial, must therefore refer, as in fact, from their general terms, they do refer, to the *College* fellows—the *teaching* fellows, and the President; and not to the *Corporate* fellows, who had not then accepted the trust. In other words, they have no sort of connection with the present question, whether the *Corporate* fellows *did reside*, and *were maintained*.

Again.—The first public document, dated in 1652, cited by the defender of the Memorialists, is a curious one, and it is strange, that it should have been cited in *favour* of the memorial. It was an order of the General Court, in which, after reciting, that *young men* after their graduation, *were apt to seek employment in foreign parts*, (we trust this did not refer to the *Corporate* fellows named in the charter) it proceeds to provide for a voluntary collection from the inhabitants of Massachusetts, to be

applied to the "maintenance of the President, *certain fellows*, and poor scholars in Harvard College." Now it is *certain*, that this could not mean the Corporation, or if it did, it proves, that a *certain* number of them were to be maintained, and *certain* others were not so to be maintained. But the truth is, and is apparent from the clause, that it referred (as many private grants did) to the *poorer* sort of *resident fellows*. No person can believe, that two years after the charter, the Corporate fellows, being fixed by the charter at five, and having a legal title, were so loosely and absurdly defined.

We will now advert to the letter of Randolph to the Privy Council, pages 70 and 71. This letter was dated 22 years *after* the charter. And Randolph declares, that there were at that time *but* "*four fellows*" in Harvard College, and that the two *senior* fellows received 30 pounds each, and the two *junior* fellows received 15 pounds each. Is this cited to prove that the *Corporate* fellows were *all* maintained? Were there not then *five corporate* fellows? Was there either *in the charter* or at any moment *since*, any *distinction of ranks* among them? Who ever heard of senior and junior fellows among the fellows of the Corporation? The charter made them *equal*, and by what power, or by what process, or by law, were they ever divided into *different grades*? It is not a little remarkable that the testimony of Randolph is discredited by the defender of the memorial himself, on the *very next* page, but certainly *I* am not disposed to *discredit* him, because his account is precisely conformable to my understanding of the College history. No man in that age confounded the *Corporate* fellows with the 30 pound, and the 15 pound salary officers, and teachers of the College.

NOTE (E.)

I THINK the following propositions are sufficiently maintained by the *researches* of the defender of the memorial, and by well authenticated documents.

First—That the charter itself laid *no* restriction *whatever* on the right of election of Corporate Fellows, except that of being “Inhabitants of the Bay.”

Secondly—That there have been *non-resident* Fellows from 1672 to 1824, and, *probably*, from the date of the charter.

Thirdly—That the only attempt to give another construction to the charter, was, after full hearing, *rejected* by one branch of the legislature, 102 years since, and has *never been renewed*.

Fourthly—That all the clauses in legislative acts and grants, which speak of the *maintenance* of the Fellows, are clearly referable either to Fellows resident for the purposes of *education*, or to that portion of the Corporate Fellows, “who resided, and did the *work of the College*.”

Fifthly—That all the private grants *recited*, were designed for the support of “College Fellows,” and not of the Corporate Fellows, a distinction which takes its date from the charter itself.

Sixthly—That there has been felt by the two College boards a reluctance to commit the whole concerns of the College to the instructors.

Seventhly—That the government of the State, under the Colonial and Provincial charters, as well as under the new constitution of the republic, have uniformly approved and confirmed this sound and natural construction of the terms of the charter.

Lastly—That if the charter *does not* restrain the two College boards in their freedom of election, it would be highly inexpedient *now* to *shackle them*. It would deprive them of the power to select from the whole community, those, whom they might deem most competent to fill these responsible and important offices.

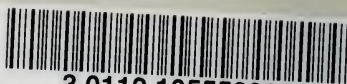
It is highly probable, that if the defender of the memorial shall continue his researches with candour, he will come to the same conclusion, at which those who have examined the question have long since arrived. Indeed, there are strong indications, not only that his colleagues have serious

doubts, but that the defender himself feels a much diminished confidence in his opinions. Men of talents are not apt to spread their arguments over so wide a surface, (and upon points which have so little relevancy,) when they feel a perfect conviction of their force, and when their acknowledged powers would enable them to bring them into a *condensed and irresistible form and compass.*

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